IN THE HIGH COURT OF UTTARANCHAL AT NAINITAL

Chapter VIII, Rule 32(2) (b)
Description of Case

Writ Petition No. 1093 of 2002 (S/B)

Date of decision: 1st July, 2005

A.F.R. (Approved for Reporting)

Not Approved for Reporting

Date Initials of Judge

Note: Bench Reader will attach this at the top of first page of the judgment when it is put up before the Judgment for signature.

IN THE HIGH COURT OF UTTARANCHAL AT NAINITAL

Writ Petition No. 1093 of 2002 (S/B)

Daya Krishna Sanwal
S/o late Sri Tika Ram Sanwal,
Presently posted as officiating
Executive Engineer,
Directorate of Medical, Health
And Family Welfare, Uttaranchal,
Dehradun ……. Petitioner

Versus

State of Uttaranchal and others ……Respondents

Mr. Manoj Tiwari, learned counsel for the petitioner.
Mr. K.P. Upadhyaya, Standing Counsel for the State of Uttaranchal.

Coram: Hon'ble Cyriac Joseph, C.J.
Hon'ble Rajesh Tandon, J.

ORAL JUDGMENT (Per Hon. C.J.)

1. The petitioner is a diploma holder in Civil Engineering. He was appointed as Overseer (since re-designated as Junior Engineer) in the Department of Medical Health and Family Welfare of the Government of U.P. w.e.f. 22.11.1966. The said appointment was on ad hoc basis. The petitioner's appointment as Junior Engineer was regularized as per order dated 18.08.1987 of the Director of Medical, Health and Family Welfare, Government of U.P. By Annexure 4 order dated 22.06.1989 of the Secretary (Medical), Government of U.P., the petitioner was promoted as Assistant Engineer on ad hoc basis and he joined duty on 23.06.1989. While he was continuing as Assistant Engineer on ad hoc basis, the new State of Uttaranchal was created. Since the petitioner belonged to the Hill Sub-cadre, he was allotted to the State of Uttaranchal as per the order dated 11.09.2001 of the Central Government. In the meanwhile, the petitioner submitted Annexures 12 and 13 representations dated 24.02.2001 and 12.06.2001 respectively, seeking regular promotion as Executive Engineer. Thereafter, by Annexure 10 order dated 22.01.2002 of the Government of Uttaranchal, sanction was accorded to the petitioner to officiate as Executive

Engineer, Dehradun on temporary basis. While the petitioner was officiating as Executive Engineer, the Government of Uttaranchal issued Annexure 14 order dated 09.08.2002 appointing the fourth respondent Sri C.B. Singh as Executive Engineer in the place of the petitioner on deputation basis. Thereupon, the petitioner filed this writ petition praying for the following reliefs:

> "A. To issue a writ order or direction in the nature of certiorari for quashing the impugned order dated 9.8.2002 passed by the respondent No. 1 in violation of U.P. Service of Civil Engineers (Medical, Health and Family Welfare Department) Service Rules 1998.
>
> B. To issue a writ order or direction in the nature of mandamus commanding the respondent No. 1 to fill the vacancy on the post of Executive Engineer in Department of Medical, Health and Family Welfare Uttaranchal only by promotion in accordance with Rule 5(3) of the relevant service Rules.
>
> C. To issue a writ order or direction in the nature of mandamus commanding the respondent No. 1 to give notional promotion as Assistant Engineer to the petitioner with effect from the recruitment year when the vacancy on the said post had occurred in the light of Rule 8 of the U.P. Promotion by Selection in consultation with Public Service Commission (Procedure) Rules 1970.
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> D. To issue any other suitable writ order or direction as this Hon'ble Court may deem fit and proper in the facts and circumstances of the case.
>
> E. To award the cost of the writ petition in favour of the petitioner ."

2. By an interim order dated 11.06.2003, this Court directed the respondents to consider the case of the petitioner for regular promotion within a period of fifteen days. It was also directed that the seniority shall be reckoned in the cadre of Assistant Engineer from the date he become eligible for being promoted on the post of Assistant Engineer and the vacancies were available in the quota. It was further directed that the entire exercise shall be undertaken within one month from the date of production of certified copy of the order.

3. In compliance with this Court's order dated 11.06.2003, the case of the petitioner was considered by the Government of Uttaranchal and an order was passed on 28.07.2003 rejecting the claim of the petitioner

for regular promotion as Assistant Engineer. A copy of the said order has been placed on record along with an affidavit dated 21.08.2003 filed on behalf of respondents 1 and 2. In the said order dated 28.07.2003, it is stated that the petitioner cannot be regularly promoted to the cadre of Assistant Engineer in view of the fact that there is no vacancy in the unreserved category. According to the Government, out of the total three post of Assistant Engineers, only one post is available for promotion and as per Roster, the first appointment can be made only from candidates belonging to the Scheduled Caste category. It is also stated in the order that the post of Assistant Engineer is within the purview of the Public Service Commission and, therefore, regular promotion to the post of Assistant Engineer can be made only through selection by the Public Service Commission.

4. Though the above mentioned order dated 28.07.2003 was placed on record by the respondents in the month of August, 2003, the petitioner has not chosen to amend the writ petition and to challenge the said Government order. In the absence of a proper challenge against the said order dated 28.07.2003, it is not possible for this Court to adjudicate the validity of the said order in this writ petition.

5. At the same time, it appears that the petitioner has got some genuine grievance. Admittedly, the ad hoc appointment of the petitioner as Junior Engineer in the State of U.P. was regularized on 18.08.1987. According to the petitioner 13 (11+2) posts of Assistant Engineers were created in the Department of Medical Health and Family Welfare, Government of U.P. in the year 1986. The method of appointment to the cadre of Assistant Engineer was prescribed as per Annexure 2 order dated 03.10.1986 issued by the Government of U.P. 33 ½ % of the posts of Assistant Engineers were set apart for promotion from the cadre of Junior Engineer. 50% of the posts to be filled up by promotion, were reserved for Junior Engineers possessing A.M.I.E. or B.E. Degree and having five years service as Junior Engineer. Remaining 50% of the posts to be filled up by promotion, were reserved for Junior Engineers

possessing diploma and having minimum service of ten years. The case of the petitioner is that there were sufficient number of vacancies in the cadre of Assistant Engineers in the Department of Medical, Health and Family Welfare of the Government of U.P. to promote the petitioner as Assistant Engineer on regular basis. Whether there were sufficient number of vacancies of Assistant Engineers to be filled up by promotion from Junior Engineers possessing diploma in the Department of Medical, Health and Family Welfare of the State of U.P. and why the petitioner was not granted regular promotion as Assistant Engineer while he was working in the State of U.P. can be explained only by the State of U.P. Though the State of U.P. has been imp leaded as the third respondent in the writ petition, the third respondent has not filed any counter affidavit explaining the position. According to the petitioner, he was working as Assistant Engineer on ad hoc basis in the State of U.P. from 23.06.1989 and there were sufficient number of vacancies in the cadre of Assistant Engineers in the Department of Medical, Health and Family Welfare of the Government of U.P. at that time for giving regular promotion to the petitioner in the quota reserved for promotion. He was in the service of State of U.P. till the creation of the State of Uttaranchal on 9th November, 2000. The petitioner has no explanation as to why he did not move the Government of U.P. for regular promotion as Assistant Engineer at the relevant time and why he did not question the inaction of the State of U.P. in considering him for regular promotion to the cadre of Assistant Engineers or the refusal of the State of U.P. to promote him to the cadre of Assistant Engineer on regular basis. There is no material placed on record to show that the petitioner had raised the above grievance before the State of U.P. at any time. Annexure 12 representation dated 24.02.2001 and Annexure 13 representation dated 12.06.2001 were submitted only to the Government of Uttaranchal. At this distance of time the petitioner cannot agitate his claim for regular promotion as Assistant Engineer in the service of the Government of U.P. The said claim, if any, has become stale and the request for interference by this Court at this distance of time is liable to be rejected on the ground of inordinate delay. Therefore, we are not inclined to

consider and adjudicate whether the petitioner was entitled to be promoted to the cadre of Assistant Engineer in the Department of Medical, Health and Family Welfare of the State of U.P. on a regular basis.

6. At the same time, the fact remains that when the new State of Uttaranchal was created, though the petitioner was allotted to the State of Uttaranchal in the cadre of Junior Engineers, he was actually working as Assistant Engineer on ad hoc basis. Admittedly, he continued to work as Assistant Engineer on ad hoc basis and he was even asked to officiate as Executive Engineer in addition to the duties of Assistant Engineer. It is also not disputed that the petitioner who worked as Junior Engineer (ad hoc) from 22.11.1966 to 17.08.1987 and as Junior Engineer (regular) from 18.08.1987 onwards and as Assistant Engineer (ad hoc) from 23.06.1989 has not been given regular promotion as Assistant Engineer till date. It is also not disputed that in the list of Junior Engineers of the Department of Medical, Health and Family Welfare allotted to the State of Uttaranchal, the petitioner was the senior most. Whatever be the technical objections mentioned in the order dated 28.07.2003 of the Government of Uttaranchal, the petitioner's case is an extremely hard case, which deserves to be considered as a special case. It is not clear from the order dated 28.07.2003 whether there are only three posts of Assistant Engineers in the Department of Medical, Health and Family Welfare of the Government of Uttaranchal. There is no clear and specific assertion to that effect in the order dated 28.07.2003. Even assuming that there are only three posts and one of them alone can be filled up by promoting a Junior Engineer, it has to be examined why the petitioner who is the senior most Junior Engineer cannot be promoted against that post. In the order dated 28.07.2003, the Government of Uttaranchal has taken the stand that as per Roster, the first appointment has to be given to a member of the Scheduled Caste. It deserves to be examined whether the Roster of Reservation is applicable when only a single post is available for appointment by promotion. Even assuming that the rule of reservation are not applicable in the case of a single post,

the Government have pointed out another difficulty. According to the Government, as per the rules in force, promotion to the cadre of Assistant Engineers can be made only on the basis of selection made by the Public Service Commission. Even if it is so, it has to be explained why the Government did not take necessary steps for making promotion on the basis of selection by the Public Service Commission. All these aspects can be considered by the Court only if the petitioner challenges the order dated 28.07.2003 of the Government of Uttaranchal and the Government is given opportunity to explain the position. In the absence of such a challenge in this writ petition, this Court cannot help the petitioner at least for the time being.

7. Though the petitioner has challenged the appointment of the fourth respondent on deputation basis, the said challenge has become infructuous. It is not disputed that on expiry of the period of one year of deputation, the fourth respondent has returned to his parent department. Therefore, we don not fine it necessary to consider the question whether the appointment of the fourth respondent on deputation basis was legal or not.

8. For the reasons stated above, the writ petition is dismissed without prejudice to the right of the petitioner to challenge the order dated 28.07.2003 in independent proceedings.

(Rajesh Tandon, J.) 01.07.2005

(Cyriac Joseph, C.J.) 01.07.2005

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